

**AMERICAN ARBITRATION ASSOCIATION
230 SOUTH BROAD STREET, 12TH FLOOR
PHILADELPHIA, PA 19102-4106**

Case No. 14 390 00484 09

In the Matter of Arbitration Between

CITY OF PHILADELPHIA

:

Employer

:

and

:

OPINION

:

AND

**FRATERNAL ORDER OF POLICE
LODGE NO. 5**

:

AWARD

Union

:

ARBITRATOR:

Robert E. Light, mutually chosen
by the parties pursuant to the rules
and regulations of the American
Arbitration Association

HEARINGS:

August 2, 2010 and October 12, 2010 at
the offices of the American Arbitration
Association, Philadelphia, Pennsylvania

APPEARANCES:

For the City

Nicole Morris, Esq.
Charles H. Ramsey, Police Commissioner
Lieutenant John Kay
Captain Gregory Malkowski

For the Union

Bridgett C. Walsh, Esq. (Jennings Sigmond, PC)
John McGrody, Union Representative
Victor Ortiz, Grievant

ISSUE:

Was there just cause for the discharge of Victor Ortiz?
If not, what shall be the remedy?

BACKGROUND

Hearings in this matter were held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania on August 2, 2010 and October 12, 2010 with both sides present and duly represented by counsel and with both sides having full and complete opportunity to offer evidence and argument in support of their respective contentions. As was arranged at the hearing, subsequent to the completion of the oral hearing, both counsel filed post-hearing briefs, after which time the hearing was declared closed.

The City of Philadelphia (hereinafter the City or the Employer) and Fraternal Order of Police, Philadelphia Lodge No. 5 (hereinafter the FOP or the Union) are signatories to a current collective bargaining agreement (Joint Exhibit No. 1). A grievance was filed by the Union on behalf of Victor Ortiz, which grievance is dated February 18, 2009 (Joint Exhibit No. 4). Mr. Ortiz had been terminated by the City effective March 16, 2009, with the Notice of Dismissal being dated on that date. In that Notice the following is stated:

In that on Friday, 04/04/03, while off-duty, inside [REDACTED], you by your own admission consumed a combination of prescription medication that required your transportation and admittance to Parkview Hospital. These prescription medications were not prescribed for you. You violated Philadelphia Police Department Directive #55, Drug Testing Policy, when you used prescription drugs which were not prescribed to you by a licensed medical practitioner. In addition, you failed to document and report the confiscation of the drugs from your sister and turn them into the proper authorities. Therefore, you violated the above section of the Disciplinary Code. You were dismissed from the Police Department on 11/07/03 on an unrelated matter and as a result, were not able to formally receive the charges for this offense after the completion of an independent investigation.

On 02/18/09, in the presence of Lt. John Kay #90, Internal Affairs Division, Lt. [REDACTED], 1st District, Sgt. Joseph Gossner #335, Internal Affairs Division, Timothy Strain, Attorney, Fraternal Order of Police and Ken Rocks, Representative, Fraternal Order of Police, you were given your Non-Criminal Grievance Warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate 30-day suspension, with the intent to dismiss. (Joint Exhibit No. 3).

The matter was not resolved during the course of the grievance procedure so it was submitted to arbitration under the auspices of the American Arbitration Association from whose panel of arbitrators the undersigned was duly chosen.

THE FACTS

At the hearing, the parties Stipulated the following:

1. Officer Ortiz was appointed to the Philadelphia Police Department on June 21, 1999.
4. On April 5, 2003, off-duty Police Officer Ortiz was found at [REDACTED] in a semi-conscious state.
5. Officer Ortiz ingested a combination of prescription medication - [REDACTED]
6. Ortiz did not have a prescription for these pills.
9. Officer Ortiz was transported and admitted to Parkview Hospital.
10. As a result of ingesting the prescription medication, Officer Ortiz violated Philadelphia Police Department Directive #55 Drug Testing Policy.
12. Officer Ortiz was placed on an immediate 30-day suspension and dismissed from the Police Department on March 16, 2009.

Further, it appears that the pills were confiscated from his sister who did not have a prescription for them (at the hearing it was testified to that the grievant's sister [REDACTED]). Further, it appears that the grievant did not report the confiscation of the drugs to the Department nor did he turn them over.

At the hearing, testifying on behalf of the City was Lieutenant John Kay, who at the time of the termination, was in Internal Affairs in the Drug Screening Unit. Mr. Ortiz testified in his own behalf at the hearing.

POSITION OF THE CITY

The City takes the position that it had just cause for the termination of Mr. Ortiz and requests that the arbitrator affirm its action in that regard. The City cites Directive #55 whose purpose is to ensure that Police Officers are acting with integrity and demonstrating this virtue to the public. It maintains that the integrity of an individual and the Department is undermined when Officers use drugs illegally and thereby place themselves above the laws they are sworn to uphold. Using prescription drugs for which the Officer does not have a prescription violates this Directive. It maintains that dismissal is warranted when an Officer uses a prescription drug which was not prescribed for the Officer by a licensed medical practitioner. While it acknowledges that this activity occurred off the job, it nevertheless asserts that Officers must be able to control themselves emotionally both on and off the job. (City Brief Page 7). One who swallows 20-25 pills not prescribed to him and used to treat depression and insomnia in other patients is not emotionally stable, according to the City. The City cites the testimony of the Police Commissioner and urges the arbitrator to sustain the City's action in terminating Mr. Ortiz.

POSITION OF THE F.O.P.

The F.O.P. takes the position that there was not just cause for the discipline in this case because Mr. Ortiz was not timely disciplined. (Union Brief Page 2). It cites the fact that the incident at issue occurred on April 5, 2003 but Mr. Ortiz was not disciplined until March 16, 2009. (Union Brief Page 2). While it is aware of the prior discharge of the grievant for another incident, it argues that it is of no moment since the City offered no explanation as to why the April 5, 2003 incident was not included in the December 3, 2003 discipline.

As regards the incident itself, the Union cites Section IX of Directive #55 and argues that the penalty of termination is too severe since the Directive provides that "disciplinary action of up to and including dismissal will be taken against the member...." The Union cites mitigating factors, one of which being off-duty conduct so that it argues discharge is too severe. Further, the Union maintains that based upon the testimony of the grievant himself, this was a one-time incident and that the grievant never abused prescription drugs any other time. (Union Brief Page 5). It asks that the grievance be sustained and that the grievant be reinstated to his prior position with a make whole remedy including back pay and benefits. (Union Brief Page 7).

DISCUSSION

The arbitrator has carefully weighed all of the evidence in the case including the testimony of the witnesses at the hearings, the arguments of respective counsel as set forth at the hearings and in their post-hearing briefs, the contract and the exhibits prior to reaching his decision.

Initially, the arbitrator must begin his analysis with the language of Directive #55 which has two parts contained therein namely, Part A which mandates dismissal against a member of the Department who tests positive in a urinalysis test, refusal to submit to a drug test or an attempt to alter the validity of the test. In Part B of Directive #55 provides for "disciplinary action up to and including dismissal will be taken...the use of prescription drug (controlled or non-controlled) which was not prescribed to an Officer by a licensed medical practitioner." Clearly this cases falls under Section B here.

To state that the Department does not tolerate its member's abuse or illicit use of drugs is stating the obvious. That would include prescription drugs for which the Officer does not have a prescription, which is the case here. After all, the grievant here is a Police Officer sworn to uphold the law and sworn to follow specific procedures with respect to the use and confiscation of drugs.

The grievant testified at the hearing and, as this arbitrator does in all cases, he closely observed the behavior and demeanor of the grievant as he testified. Mr. Ortiz stated that what was involved here was an isolated incident during a dark period in his life, and that he is now rehabilitated. While this arbitrator cannot condone the grievant's actions here with respect to the use of these prescription drugs, nevertheless he is inclined to give him one more chance based upon his credible testimony that this was a one-time incident and that he had never abused prescription drugs before. (At the hearing it was further Stipulated that the grievant had two subsequent drug tests that were negative and that he would be tested again and required to pass a psychological examination should he be reinstated).

In sum, the arbitrator is inclined to sustain the grievance to the extent that Mr. Ortiz be reinstated subject to the proper safeguards namely the taking and passing of a psychological examination, the taking and passing of a drug test and any other City-mandated requirements when an individual is reinstated subsequent to a termination. Further, based upon the totality of the record here, the arbitrator is reinstating the grievant but without any back pay entitlement.

Therefore, the undersigned having duly heard all of the proofs and allegations of the parties in this proceeding makes the following:

AWARD

In accordance with the comments contained in the within Award, Police Officer Victor Ortiz is to be reinstated to his prior position with the City but without any back pay entitlement.



ROBERT E. LIGHT ARBITRATOR

State of New Jersey:

ss

County of Somerset:

On this 8th day of January 2011 before me personally came and appeared ROBERT E. LIGHT to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.


LEE M. MASELLI
NOTARY PUBLIC STATE OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 3, 2015